In the United States Circuit Court of Appeals for the Ninth Circuit

GUISEPPI PINASCO,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 3379

Upon Writ of Error in the United States District Court, for the Western District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR.

ROBERT C. SAUNDERS,
United States Attorney,
CHARLOTTE KOLMITZ,
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Metropolitan Press, Seattle

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I.

At the outset we desire to call this court's attention to the fact that the 1st, 2nd, 3d, 4th and 5th assignments of error need not be considered, as no demurrer is interposed in this case.

The 8th, 14th, 18th and 22nd assignments of error need not be considered, as the motion in arrest of judgment was sustained as to count III of the Indictment on which these assignments of error are based. (Tr. p. 16)

The 25th, 26th and 27th assignments of error will not be considered as no ground or reason for the assignments of error is stated, and said assignments are not touched on in the brief of counsel.

These assignments of error will not be considered in this brief.

II.

The 6th, 7th, and 9th assignments of error are based on the court's ruling in denying the amended motion to quash the Indictment.

The 12th, 13th and 15th assignments of error are based on the court's overruling, immediately prior to the introduction of any testimony and after the first witness had been sworn, the objection of the defendant to the introduction of any testimony on the part of the Government, for the reason that the various counts did not state facts sufficient to constitute a crime.

The practice of attacking an indictment, as not stating an offense, by objection to introduction of evidence, does not prevail in Federal courts, and will not be permitted, except under extraordinary circumstances.

McKnight v. United States, 252 Fed., p. 687.

The 16th, 17th and 19th assignments of error are based on the court's overruling, at the conclusion of the evidence of the Government, of motion of the defendant for an instructed verdict, for the reason that the various counts do not state the facts sufficient to constitute a crime, and for the further reason that there is not sufficient evidence to warrant a conviction. As to the latter ground assigned as error, the appellant's bill of exceptions shows the contrary. (Tr. p. 24.)

The 20th, 21st and 23d assignments of error are based on the court's overruling the motion of defendant for an instructed verdict at the conclusion of all the testimony.

The 24th assignment of error is based on the court's overruling the motion in arrested judgment.

The same general ground of objection runs through all the foregoing assignments of error, enumerated under subdivision II, and they will all be considered together.

The appellant's argument is predicated upon the proposition that the Internal Revenue Statutes have

been repealed by later legislation, and call attention to the War Time Prohibition measure. The particular statute to which the appellant refers is not shown. The case of U. S. v. Schmander, 258 Fed. 251, refers to what is popularly known as the War Time Prohibition Act. I therefore will assume that counsel referred to the same statute as is discussed, 258 Fed. 251 supra, more accurately known as the Act of November 21, 1918. This Act cannot be urged on this appeal as repealing the Internal Revenue Statutes, for the reason that the Act of November 21, 1918, did not go into effect until July 1, 1919, which was subsequent to the commission of the crime in this case, which was January 3, 1919. (Tr. p. 24).

Granted for the sake of argument that the War Time Prohibition Measure above referred to was in effect at the time of the commission of the crime, it cannot be said that the Internal Revenue Statutes are repealed, for the reason that the purpose and substance of the acts are vastly different. The War Time Prohibition Act makes it an offense to sell distilled or malt liquors and to make malt liquors, whereas the Internal Revenue Statutes in question make it an offense to carry on business of a distiller without giving a bond; to carry on the business of a distiller without giving notice to the Internal Revenue Department of intention to do so,

and with using a still for the purpose of distilling in a dwelling house. (Secs. 3258, 3259 and 3266, R. S.)

There is no authority for the statement of counsel that no license could be had or no bond given for the distillation of intoxicating liquors since the Prohibition Act went into effect. The contention rests solely upon the counsel's assertion. Of course it cannot be contended that the State liquor laws referred to in counsel's brief repealed or modified the Federal laws. Nor can it be contended that the Reed Amendment either modified or repealed the statutes upon which the indictment herein is based. The Reed Amendment deals exclusively with the subject of interstate commerce and prohibits the shipment of intoxicating liquors into dry territory. Neither of these laws even touch the field covered by the Internal Revenue Act, and cannot by any stretch or implication be held either to repeal or modify that Act.

The License Tax cases, 72 U. S. 462; 18 Law Ed. 497, effectually dispose of counsel's whole contention, and both the legislative and judicial branches of the Federal Government, and the State Prohibition and Federal Internal Revenue Act could exist side by side as was said. The State law in no way interferes with the authority of Congress. On the contrary, when Congress exercises its authority in a matter within its control, State laws must give way in view of the regulation

of the subject matter by the superior power conferred by the Constitution.

U. S. v. Dan Hill, 248 U. S. p. 420.

While the primary purpose of the Internal Revenue Act is to raise revenue, it is also properly used as an addition to the State and to the Federal legislation in dealing with intoxicating liquors. It is obviously in the policy of the Government to leave no twilight zone, and to restrict the intoxicating liquor business in every manner possible.

In re Charge to the Grand Jury;

162 Fed. 736, 739

U. S. v. Doremus, 249 U. S. p. 86 and cases cited therein.

III.

As to the 10th assignment of error, there is nothing in the transcript or brief to show the nature of the status of the action and no final adjudication is shown; in fact, it is stated that the action is pending. We submit that the 10th assignment is too indefinite and vague to be considered by this court. And there are no authorities which go to the extent of holding that mere pendency of a civil action is a bar to a criminal action or that the mere pendency of a criminal action is a bar to a civil action.

As to the 11th assignment of error, the same objection might be made that the authorities do not go to the extent of requiring an election. If, however, counsel's theory of election is correct, then the defendant is not prejudiced, for the Government has virtually elected to try the criminal case first by proceeding to conviction and sentence in the criminal case. If the termination of one suit is a bar to the other, the question should properly be raised at the termination of one action or the other; or, in this case, in the civil case, at the termination of this criminal action.

There is nothing in the record to show that the offense charged in the civil suit is the same as stated by counsel in his brief, nor are the facts upon which the Government would hope to procure a judgment in the civil case identical with those in the criminal case.

Granted for the sake of argument that one case has been concluded, the weight of authority is in line with the Government's contention. The case of United States v. Three Copper Stills, 47 Fed. 495, holds that, one who has been convicted for illicit distilling is estopped to claim as his own the distillery forfeited thereby, and such a conviction is not a bar to a proceeding in rem to prevent the forfeiture. (This case distinguishes the case of U. S. v. McKee, 4 Dill 128, and the case of Coffey v. U. S. 116 U. S. 436, cited by counsel.)

The Palmyra, 12 Wheat, 14.

The proceedings in rem for forfeiture stand independent of, and wholly unaffected by any criminal proceeding in personam and vice versa.

U. S. v. Olsen, 57 Fed. 579;

(Distinguished U. S. vs. McKee, supra, U. S. v. Coffey, supra, and U. S. v. One Distillery, 43 Fed. 816)

U. S. v. Stone, 64 Fed. 667,

(Distinguishes Coffey case, supra)

U. S. v. Jaedicke, 73 Fed. 100,

(Distinguishes the Coffey case, supra)

23 Op. Attorney General, 63 (Brief 1900)

Wood v. U. S. 204 Fed. 55

Origet v. U. S. 125 U. S. 240.

The quotation in counsel's brief taken from U. S. v. Shapleigh, 54 Fed. 126, is obiter dicta, and not in line with the weight of authority.

Respectfully submitted,

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